(12)

No. 85-1277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, et al.,

Petitioners,

—v.—

GENE H. ARLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION, AMERICAN NURSES ASSOCIATION, AND NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICI CURIAE*

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On Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit

MOTION FOR PERMISSION TO FILE BRIEF AMICI CURIAE

The American Public Health Association, the American Civil Liberties Union, the American Nurses Association and the National Association of Protection and Advocacy Systems respectfully move this Court for permission to file the accompanying brief

amici curiae in support of Respondent. Consent was granted by both parties to the filing of a brief by the ACLU. In a subsequent request to add other parties, Respondent consented but no response was received from Petitioner. Leave of this Court therefore is requested under Rule 36 of this Court.

The interests of the amici are set forth below. The accompanying brief addresses issues of fact and law concerning both the public health and the civil rights ramifications of this case. Amici have reason to believe that their brief will supplement rather than reiterate the arguments made by Respondent.

INTERESTS OF AMICI CURIAE

American Public Health Association

The American Public Health Association ("APHA"), founded in 1872, is the oldest and largest professional public health society in the world, with a combined national and affiliate membership of over 50,000 health professionals. The largest single component of APHA members are officials and employees of federal, state and local public health agencies. APHA members include physicians, dentists, nurses, social workers, health planners, administrators, and other health professionals.

APHA strives to advance and protect the health of the American people by promoting preventative measures, including restricting the spread of communicable diseases, increasing the availability of health services, encouraging a safe and healthful

environment, launching public health education programs, and publishing numerous materials reflecting developments in public health. APHA publishes the definitive compendium "Control of Communicable Diseases in Man" (14th Ed. 1985, A.S. Benenson, Ed.).

American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nation-wide, non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights. Since its founding in 1920, it has participated in thousands of cases involving questions of constitutional and statutory law.

American Nurses Association, Inc.

The American Nurses Association is the national oranization of professional nurses. It is a federation of fifty-three

constituent state and territorial nurses associations. Through its federation members, ANA has a membership of 188,000 registered nurses.

One unique purpose of ANA is to shape public policy about health care consonant with the goals of nursing and public health. The association is committed to the protection of both the public health and the individual rights of patients and nurses within the health care system.

Nurses are the largest single group of health care providers. They provide health care for patients with communicable diseases and other life-threatening ailments. Accordingly, many nurses have been exposed to and have contracted such infectious diseases as tuberculosis, hepatitis and measles. Nurses and the ANA thus have a vital interest in an approach to Section 504 which appropriately protects the public and

individuals in accordance with established guidelines of the Centers for Disease Control and professional organizations.

National Association of Protection and Advocacy Systems

The National Association of Protection and Advocacy Systems represents Governor-designated Protection and Advocacy Systems established pursuant to Section 113 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6042, and Governor-designated Client Assistant Projects established pursuant to Section 112 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §732. These agencies have the statutory mandate to protect and advocate the rights of developmentally disabled persons and other handicapped persons. Both types of agencies protect the rights of persons under

Section 504 of the Rehabilitation Act, including persons with common, communicable diseases.

Respectfully submitted,

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AND
NATIONAL ASSOCIATION OF PROTECTION AND
ADVOCACY SYSTEMS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

SUMMARY OF ARGUMENT

In Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, Congress prohibited employment discrimination by federally funded agencies against handicapped persons who were otherwise qualified to do the job in question. When a court is

confronted by a case, such as this one, in which the employer alleges that a firing is justified because plaintiff's handicapping condition is or has been or is thought to be communicable, the proper inquiry is whether a significant risk exists of endangerment to others by transmission of the disease. To be accurate and meaningful, this inquiry must be tailored to each individual, his or her specific condition, and the particular work situation. The structure of the analysis is no different than when courts analyze whether some other aspect of a handicap - such as a lesser ability to see or hear or operate equipment - poses a risk of danger to other persons. Reliance on this standard protects both public health and the rights of millions of Americans who otherwise could be barred from federal jobs and programs.

The medical facts about the condition at issue in this case, tuberculosis, show that

its actively infectious period is short. Widely available medical tests can easily and accurately indicate when that period is over. Medical authorities are unanimous that once the risk of transmission has ended, the tuberculosis patient can and should return to work.

Thus there is no public health need for the trial court's ruling excluding communicable diseases per se from the scope of Section 504, a ruling which has no basis in statutory language, legislative history or case law. Nor is the position advanced by Petitioner and the Department of Justice tenable, that firing Ms. Arline based on fear of contagion was not a firing based on a handicap. Communicability is an inherent (although often dormant) characteristic of tuberculosis and many other diseases. It comprises an inseparable part of the impairment, real or perceived, which flows

from having the handicap, and cannot be equated to coincidental characteristics such as height or weight. The Justice Department's theory that nothing more than a fear of contagion, however irrational, can preclude action under Section 504 is a flagrant misreading of the Act and a violation of its core purpose -- to prohibit medically unjustified discrimination against handicapped persons.

Promotion of public health concerns is aided, not impeded, by an individualized determination of whether persons with communicable conditions are qualified to work. Protecting affected workers from loss of employment encourages immediate reporting of symptoms and quick treatment, the most effective method of preventing transmission of tuberculosis. Section 504, properly interpreted, poses no threat to public health systems based on reporting cases of disease

and isolating patients when medically necessary.

ARGUMENT

1. TUBERCULOSIS IS A DISEASE WHOSE INFECTIOUSNESS ENDS PROMPTLY WITH TREATMENT AND FOR WHICH A TEST EXISTS TO DETERMINE NON-INFECTIOUSNESS TO A MEDICAL CERTAINTY.

In the United States an estimated 15 million people have been infected by the germ which causes tuberculosis.[1/]

All of these people have the potential for having the infection progress to disease and

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1/ Tuberculosis (United States Public Health Service, Centers for Disease Control, undated) at 2. The Health Examination Survey of the National Center for Health Statisics found the prevelence of infected adults (positive skin tests) was between 16.1% and 21.5% of persons aged 25-74. Nat'l Center for Health Statistics, Tuberculin Skin Test Reaction Among Adults 25-74 Years, DHEW Publication No. (HRA) 77-1649 at 5-6 (1977). Applying these percentages, the numbers of infected American adults range from 38,640,00 to 51,600,000.

thereby become communicable, but the actual occurrence of the disease and its transmission is low. Leff & Geppert, Public Health and Preventive Aspects of Pulmonary Tuberculosis, 139 Arch Intern Med 1405 (Dec. 1979). In 1978, there were 28,521 reported cases of tuberculosis; unpublished data of the Centers for Disease Control (CDC) of the United States Public Health Service show a decline to 22,201 reported cases in 1985.

CDC offers the following summary of tuberculosis:

> A person with tuberculosis coughs or sneezes into the air thousands of tiny, moist droplets which may contain one or two tubercle bacilli. These droplets dry out and become small flecks, called "droplet nuclei," which are light enough to remain floating in the air.
>
> The typical setting for infection is a closed room with poor ventilation. If the germs float out into the sunlight, they are quickly killed. In a closed room, another person can breathe in these tiny droplet nuclei. But the body has many natural traps which catch such foreign elements. To infect a person, a droplet nucleus must ride the air deep into the lungs without being stopped.

There it becomes imbedded and the germ begins to multiply very slowly.

> Germs such as those causing tonsillitis multiply in a matter of minutes. The TB germ takes about 18 to 24 hours to reproduce itself just once. But a tonsillitis infection lasts only a few days, whereas tuberculosis infection can last for the remainder of a person's life.
>
> Though tubercle bacilli begin to muliply and spread, the body sets up a defense. Usually the defense is sufficient to stop the growth of the germs and further progression of the disease is halted for the rest of the person's life. This is possible because the germ will hibernate without ever causing disease, and the damage done seldom has any effect on the person's physical well-being.
>
> Sometimes, though, disease develops soon after a person becomes infected. This does not occur often, so the greatest danger is the long-term threat of tuberculosis infection. Infection from years earlier may progress to disease during periods of stress caused by other illnesses or physical or emotional hardship, but often for no apparent reason. When the disease develops, the infection can be spread to others.

Tuberculosis, supra, n. 1 at 2-3.

Symptoms of tuberculosis which usually appear first are loss of weight and strength,

fatigue, irregular appetite and low-grade fever. As the disease progresses and becomes communicable, cough, thick mucus brought up from the lungs or blood-streaked sputum may develop, and chest pains and breathing difficulties may occur. Id. Untreated, the disease may become debilitating, but with treatment, over ninety percent of patients are relieved from symptoms and become non-communicable within days or weeks. American Thoracic Society, and Centers for Disease Control, Control of Tuberculosis, 128 Am. Rev. Respiratory Disease, 336, 340 (Aug. 1983); Lester, Treatment of Tuberculosis, in Pulmonary Diseases and Disorders, 1306-07 (1980). Eight-and-one-half percent of persons with the disease are drug resistant to some degree, although varying the components of the chemotherapy often results in cure. Glassroth, Robins & Snyder, Tuberculosis in the 1980s, 302 New Engl. J.

Med. 1441, 1445 (June 26, 1980). Approximately 3000 people died from tuberculosis in the United States in 1977. Id. at 1441.

Tuberculosis is not a highly infectious disease and transmission usually requires fairly close, frequent or prolonged exposure. Leff & Geppert, supra, at 1405-06. The best method to break the chain of transmission is decontamination through proper ventilation, often an open window. Although infants are more susceptible to tuberculosis, among children 5 to 13 years old the incidence of the disease is no greater than the population as a whole. Comstock, Livesay & Woolpert, The Prognosis of a Positive Tuberculin Reaction in Childhood and Adolescence, 99 Am. J.

Epidemiology, 131, 134.[2/]

The public health laws of the United States expressly recognize the distinction between an infection and the communicable stage of a disease. The basic provision is 42 U.S.C. §264 which authorizes the Surgeon General to isolate persons within the United States "reasonably believed to be infected with a communicable disease in a communicable stage." 42 U.S.C. §264(d). (emphasis added) The regulations of the Surgeon General are to like effect. 21 C.F.R. §§1240.40, 1240.50. Similarly, the Immigration and Naturalization Act provides for exclusion of aliens "who are affected with any "dangerous contagious disease." 8 U.S.C. §1182(a)(6). The Public Health

2/ The only physician whose testimony is in the record appeared to believe that elementary school children are more susceptible to tuberculosis than older children and adults, a position not supported by the medical research.

Service regulations applicable to the immigration laws define "dangerous, contagious disease" as including "tuberculosis, active." 42 C.F.R. §344.

References to public health measures in briefs supporting Petitioner fail to make the distinction between infection and a disease in a communicable stage. All fifteen million or more "infected" Americans are potential future communicators but cannot communicate tuberculosis until they are actually afflicted with the disease itself, that is, develop active illness. As the CDC states, "[w]hen disease develops, the infection can be spread to others." Tuberculosis, supra n. 1 at 3. The disease and its infectiousness are inseparable; the basic medical facts thus reject the attempt of Petitioner and the Department of Justice to separate them. See infra at 26-35.

The advent of effective drug therapy in

the 1940s and 1950s has dramatically shortened the length of the active tubercular disease and hence its period of communication. A leading text notes:

> The clinical course of tuberculosis has been transformed from that of a lingering disease, often pursuing a downhill course, to that of a curable disease whose symptoms rapidly disappear. With the decline in infectiousness for others, isolation procedures can be eased. So dominant is the chemotherapeutic effect that bed rest can be dispensed with and, in many cases, full activity resumed in a few weeks. For the tuberculosis patient, the change from prolonged isolation in a sanitarium with guarded prognosis to relatively normal life with good prognosis is nothing short of miraculous.

Riley, The Changing Scene in Tuberculosis, in Pulmonary Diseases and Disorders, 1229 (1980).

In fact, TB sanitariums have virtually disappeared. As the CDC concludes, "[p]ersons with TB disease can live and work productively and can be cured by taking their medicine as prescribed." Tuberculosis, supra n.1 at 5.

The other major factor with respect to

control of contagiousness of tuberculosis is the development of two tests which can determine when a patient is no longer infectious -- the sputum smear and the sputum culture.

Microscopic examination of a sputum smear is regularly used to determine infectiousness. Glassroth et al., supra, at 1443. The sputum smear can be examined immediately so that no delay is necessary. Id.; Farer, The Modern Approach to Tuberculosis Management, in J. Respiratory Diseases 92 (Jan. 1980). The American Thoracic Society, the professional medical society for pulmonary disease, and CDC have established criteria for when an otherwise healthy patient with tuberculosis may return to usual activities such as work or school. These criteria provide that a return is appropriate when "adequate treatment has been initiated and the sputum is free of bacilli

or the number of bacilli present in sputum smears is declining." American Thoracic Society and Centers for Disease Control, Guidelines for Work for Patients with Tuberculosis, 108 Am. Rev. Respiratory Disease 160 (July 1973). CDC standards provide that when three consecutive [smear] specimens are negative, the patient may be considered a "non-transmitter." Centers for Disease Control, Guidelines for Prevention of TB Transmission in Hospitals, HHS Publication No. (CDC) 82-8371 at 5 (1982).

The other test which definitively determines non-infectiousness is based on a culture study of specimens of the patient's sputum; a negative culture indicates the absence of active disease and hence the patient is non-communicable. Ninety percent of patients are culture negative within ninety days of treatment. Amer. Thoracic Society, Control of Tuberculosis, supra at

340; Lester, supra, at 1306-07.[3] A culture test may require four to six weeks before results are available so that complete verification of non-communicablity entails a waiting period. However, it has long been recognized "that patients on effective chemotherapy lose their infectiousness for others long before the sputum culture is negative." Riley, supra.

What emerges from an understanding of the contagiousness of tuberculosis is that the true danger lies in the person who has not received treatment, and is not isolated (where necessary) for the short period of time before the disease responds to chemotherapy and is no longer contagious. Studies have demonstrated that once treatment begins, there is no difference in the rate of

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3/ Respondent tested positive on a culture in 1979 and was negative in 1981. J.A. 19-20. The Joint Appendix does not indicate whether there were any tests in between these two or the results.

infection of family members of tuberculosis patients treated at home as compared to those treated in a hospital. Leff & Geppert, supra, at 1406. "It was concluded that tuberculosis infection was acquired prior to the initiation of therapy in the index cases and that once therapy was initiated there was no appreciable risk of new contacts acquiring infection from the index case even during the first few days of therapy." Id.

The dangerous carrier is someone who has the symptoms, conceals them and delays seeking medical care because of the fear of adverse consquences, such as a loss of employment. Once medical care is sought, the danger of infection is removed by the provision of chemotherapy (and a short period of isolation, in a minority of cases, if necessary). Removing the fear of permanent

job loss encourages prompt treatment.[4/] Thus, protection of the long range employment rights of tuberculosis patients decreases the possibility of infecting others and advances public health protection.

Medical opinion is unanimous that the public is protected from transmission of tuberculosis by treatment of the patient, and that isolation is necessary only in limited cases, usually for short time periods. The Guidelines for Work for Patients with Tuberculosis of the American Thoracic Society and CDC provide that "patients with all forms of tuberculosis should be encouraged to continue with or to

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4/ Since all states require reporting of tuberculosis, a patient cannot seek treatment without his/her condition becoming known to public authorities, who are usually charged with the responsiblity for taking action to prevent communication. See e.g., Fla. Stat. Ann. §381.23 (1986); 10 NYCRR §§2.6(c), 2.17, and N.Y. Public Health Law §§2101-2105.

return to their previous activities as soon as they are physically able." American Thoracic Society, etc., Guidelines, supra, at 160. "Criteria for return to work should always be individualized." Id. The strongest evidence that tuberculosis does not warrant the permanent exclusion of teachers from employment in schools is found in the report of the Child Day Care Infectious Disease Study Group of the Centers for Disease Control. Public Health Considerations of Infectious Diseases in Child Day Care Centers, 105 J. Pediatrics 683 (Nov. 1984). Even though the pre-school population of day care centers is the most susceptible to the disease, persons with active tuberculosis may resume activities at these centers when health officials state that the patient is no longer contagious. Id. at 693. Even persons who test positive for tuberculosis infection in routine

screening tests may continue to be employed in a day care center, although preventive chemotherapy may be appropriate. Id.; see also American Thoracic Society, etc., Guidelines, supra at 160.

The medical facts about tuberculosis thus demonstrate that public health concerns are best served by early detection, appropriate treatment and follow-up testing to ascertain when the stage of infectivity has passed. Typical cases require that the patient be excluded from normal interactive situations such as work or school for only brief periods of time.

2. COMMUNICABLE DISEASES ARE NOT PER SE EXCLUDED FROM COVERAGE UNDER SECTION 504.

The threshold legal question in this case is whether a disabling condition which would otherwise fall within the statutory definition in 29 U.S.C. §706(7)(B) (Supp. V 1982) must be excluded per se from the scope

of the Act if that condition is ever communicable. The District Court concluded that Respondent "suffers a handicap" but, based solely on speculation, held that contagious diseases are not handicaps within the meaning of Section 504.[5/] The Court of Appeals correctly reversed. Arline v. School Board of Nassau County, 772 F.2d 759, 764 (11th Cir. 1985). Although this Court accepted review of the first question

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5/ Ruling from the bench, the trial court stated:

> [T]he Court hereby finds that [Ms. Arline] is not such a handicapped person. No question that she suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts. I'm aware that the courts have held that alcoholism, cancer, blindness, various other things, have been determined to be handicapped persons, but it's just the Court's opinion that an infectious disease such as the plaintiff in this case had, in my opinion, does not fall within that handicapped definition.

Petition for Certiorari, App. C-2.

presented, both Petitioner and amicus the Department of Justice have abandoned defense of the per se exclusion of communicable diseases which was the basis of the District Court's opinion.[6/] However, this Court granted certiorari on that question and it remains in the case.

Petitioners abandoned the District Court's rationale for good reason. Nothing in the language or legislative history of the Act suggests that communicability alone negates its applicability. Questions about possible risk to others which are raised by the nature of the disability are properly resolved, not by a tortured interpretation of the Act's definition, but by a reasoned

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6/ "An individual who is disabled with an infectious, contagious disease surely may be a 'handicapped individual' within the meaning of the Rehabilitation Act." Brief of Department of Justice. Petitioner now argues not that the definition be interpreted to exclude all those with contagious conditions, but only "carrier[s] of a contagious disease who demonstrate[s] no external manifestations of a physical or mental impairment." Brief of Petitioner at 26.

analysis of its "otherwise qualified" provision. The object is to determine whether the employment of someone with a handicap such as Ms. Arline's creates an appreciable risk to herself or others which renders her unqualified to perform the designated task. See infra at 42-58.

In 1977, the then Department of Health Education and Welfare promulgated the major contemporaneous regulations which construed the definition of handicap in Section 504 to include diseases as well as loss of limb or function.7/ The Department specifically

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7/ The regulations provide:

"Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 CFR §84.3(j)(2).

Additionally, the Department's analysis of the regulation stated:

(cont'd next page)

rejected suggestions received during the public comment period to narrow the reach of the definition of "handicapped person," stating:

> The most common recommendation was that only 'traditional' handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicapped.

45 C.F.R. 84 App. A at 310 (1985)

These agency regulations are, of course, entitled to special deference in determining the scope of coverage intended by Congress. Congress amended the Act again in 1978; and, as this court has noted, except for what was

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"The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." 45 C.F.R 84 App. A. at 310 (1985) (emphasis added).

specifically changed, these "1978 Amendments to the Act were intended to codify the regulations enforcing §504." Alexander v. Choate, ___ U.S. ___, 83 L.Ed.2d 661 at 674 n. 24 (1985), citing Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984). The 1978 amendments are particularly significant with respect to arguments urging a limited conception of the meaning of handicap. Focussing carefully on the expansive approach in the regulations, Congress specifically altered the Act's definition to limit coverage in cases involving alcoholism and drug abuse. 29 U.S.C. §706 (7)(B)(Supp. V 1982). Congress could have, but specifically did not, exclude diseases or categories of diseases when it revised the definition in 1978.8/

8/ Congress's failure to alter an administrative agency's interpretation of a statute, particularly in the face of a longstanding agency interpretation, (cont'd next page)

Moreover, the agency's construction has been validated by what amounts to a consensus among the federal courts that diseases properly fall within the scope of the Act. Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (epilepsy); Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (dyslexia); Treadwell v. Alexander, 702 F.2d 973 (11th Cir. 1983) (heart disease); Bentivegna v. U.S. Department of Labor, 694 F.2d 619 (9th Cir. 1982) (diabetes); Pushkin v. Regents of the University of Colorado, 658 F.2d 1392 (10th Cir. 1981) (multiple sclerosis); and New York Assn. for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) (retarded children with hepatitis-B viral infection). The

creates a strong presumption in favor of the agency's interpretation. Guardians Association v. Civil Service Comm'n, 463 U.S. 582 (1983); Zemel v. Rusk, 381 U.S. 1 (1965); U.S. v. Rutherford, 442 U.S. 544 (1979); Costanzo v. Tillinghast, 287 U.S. 341 (1932). This presumption is further strengthened when Congress has taken other action to amend the statute. Sure-Tan v. NLRB, 467 U.S. 883 (1984).

diseases analyzed by the courts in these cases include ones which are communicable (hepatitis-B virus) and degenerative (multiple sclerosis).

Nothing in the legislative history supports the argument that Congress intended a distinction among kinds of diseases -- whether based on communicability or any other factors -- to silently alter the definition. Cf. Consolidated Rail Corp v. Dorrance, 465 U.S. 624, 631-4 (1984). Having rewritten the definition to extend its reach, having known of the enforcement agency regulations, and then having carved out a small exception to that scope, Congress indicated with the greatest possible clarity its endorsement of a broadly-defined protected class.

3. DISCRIMINATION BASED ON AN INHERENT CHARACTERISTIC OF A HANDICAP -- SUCH AS COMMUNICABILITY -- IS DISCRIMINATION BASED ON A HANDICAP.

Having abandoned the per se exclusion

argument, Petitioners and the Department of Justice now seek instead to block the applicability of Section 504 to certain conditions by declaring one element of some diseases, the possibility of communicability, to be a separate characteristic for which discrimination is never unlawful.9/

They construct this theory by arguing that if an employer shows fear of contagiousness -- whether rational or irrational -- to be the reason for exclusion, there can be no claim of discrimination under Section 504. Contagiousness, however, is an inherent (although often dormant) characteristic of

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9/ The fullest statement, and apparent origin, of this position is found in the Justice Department's policy opinion on the applicability of Section 504 to AIDS and related conditions. U.S. Justice Department, Office of Legal Counsel, Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, Re: Application of Section 504 of the Rehabilitation Act to Persons wth AIDS, AIDS-related Complex, or Infection with the AIDS Virus, cited as Justice Department AIDS Opinion. A copy has been lodged with the Court by Petitioner.

tuberculosis and many other diseases. It is therefore not only a semantic trick to try to distinguish an inherent characteristic from the disease of which it is a part but a clear contravention of Congressional intent as well.

The correct approach to Section 504 is to recognize that Ms. Arline is a handicapped person within the meaning of the Act and then to inquire into the risks to others arising from her handicap as part of the determination whether she meets the "otherwise qualified" requirement of the Act. As shown below, such an analysis avoids an all or nothing determination in favor of a balanced approach which protects the public from danger and the individual from discrimination arising from baseless fears and prejudices.

The inherent characteristics of a disease comprise part of the impairment,

actual or perceived, associated with the disease. If a condition satisfies the statutory criteria for a handicap, the application of Section 504 cannot be negated by treating the disease's intrinsic elements as coincidental physical descriptors, like height or weight or eye color.

The courts which have interpreted Section 504 have recognized that the inherent characteristics of a physical or mental condition are not separable from the condition for the purpose of defining "handicapped person." Such cases have included situations in which some elements of a handicap posed a threat of harm to others. Both the Second Circuit and the Fifth Circuit have held that plaintiffs met the threshold burden of establishing handicap when a mental illness rendered them incapable of handling stressful situations, involving a risk to co-workers and clientele. Doe v. New

York University, 666 F.2d 761, 775 (2d Cir. 1981); Doe v. Region 13 Mental Health-Mental Retardation Commission, 704 F.2d 1402, 1408 rehearing en banc denied, 709 F.2d 712 (5th Cir. 1983). Finding that a handicap existed did not prevent these courts from examining individual facts and concluding that the persons were appropriately excluded because the risk they posed to others was significant. Compare Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1388 (10th Cir. 1981) in which the side effects of drugs necessary for treating multiple sclerosis were analyzed as aspects of a handicap which could properly be weighed in determining job fitness, but did not render Section 504 inapplicable.

To adopt the Justice Department's theory that a characteristic of a disease can be disconnected from all other aspects of the handicap would open the door to wholesale

evisceration of the Act. The Justice Department theory is indistinguishable in its structure from the argument that Section 504 covers discrimination based on blindness or hearing impairment, but does not apply if the defendant asserts a risk of danger to others from the plaintiff's lesser ability to see or hear. See, Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1977). The correct inquiry is whether a significant risk to other persons actually exists. To accept the proposition that merely showing a fear of danger precludes review would nullify precisely the effect which Congress intended the Act to have.

The practical implications of adopting the Justice Department's proposal would be enormous. Tens of millions of Americans could be denied employment or participation in federally funded programs because at one time in their lives they had a communicable

disease. For example, a child who contracted tuberculosis as an infant could be forever barred from attending public school and relegated to home instruction for the child's entire schooling, even though the child was cured, i.e., no longer had an active case, and could not communicate tuberculosis to others. Indeed, virtually the entire population could be subject to irrational discrimination based on medically unsupportable allegations of "fear of contagion" because almost all adults carry the herpes virus that accompanies chicken pox and which may manifest itself in adults in the disease known as shingles. Control of Communicable Diseases in Man (Benenson, ed. 1985) 70. Chicken pox presents a classic example of viral latency in the ability of the variella zoster virus to cause recurrent clinical disease in the form of shingles decades after infection. Another member of

this same virus family, herpes simplex virus type 2, also causes a recurrent communicable disease of wide occurrence. Guinan et al, Epidemiology of Genital Herpes Simplex Virus Infection, in 7 Epidemiology Rev. 140 (1985). Recent studies indicate that a quarter or more of the adult population, more than 40 million people, are carriers of genital herpes. Eckholm, "Genital Herpes is More Common but the Alarm is Diminishing," New York Times, July 8, 1986 at C-1. Initial public reaction to knowledge about the disease led to actions similar to those triggered by AIDS, such as attempts to ban children with herpes from schools. "Scientists describe the[se] efforts . . . as preposterous." Id.

Schoolchildren with AIDS present another example of the wrongheadedness of the all-or-nothing approach of Petitioner and the Department of Justice. The Centers for

Disease Control have stated that most HTLV-III/LAV-infected schoolchildren can be allowed to attend school normally, after an individualized determination of what would be the best educational setting based on the behavior, neurologic development, and physical condition of the child and the expected type of interaction with others. U.S. Centers for Disease Control, 34 Morbidity and Mortality Weekly Report 106-109 (Aug. 30, 1985). Efforts to block school attendance by these children have been rejected by the courts. In re District 27 Community School Board v. Board of Education of City of New York, 130 Misc. 2d 398 (N.Y. Sup.Ct. 1986); Bogart v. White, No. 86-1444 (Clinton Cty, Ind., Circuit Ct., April 10, 1986). In New York City, where the CDC recommendations for an individualized examination of each case are followed, school officials recently announced that six of the

13 children with AIDS were to be admitted to the public schools. Perez, "6 AIDS Children to Attend Schools, City Officials Say," New York Times, Aug. 26, 1986 at p. B-1.

The enormous number of people vulnerable to discrimination based on erroneous fears of contagion, by virtue of their simply being carriers of a virus or other communicable disease, demonstrates the need for statutory protection. Section 504 was designed to protect against such irrational and unfair treatment by recipients of federal funding.

4. DURING PERIODS WHEN THEIR TUBERCULOSIS IS NON-COMMUNICABLE, PERSONS SUCH AS RESPONDENT REMAIN HANDICAPPED BECAUSE OF THEIR HISTORY WITH THE DISEASE AND THE PERCEPTION THAT THEY ARE IMPAIRED.

The record indicates that Ms. Arline's tuberculosis was non-communicable by 1981. J.A. at 20, 31. The record is unclear as to when her communicable period in 1978-9 ended. She remained covered by Section 504

throughout the time at issue here because of her past impairment and because of the perception of impairment.

Congress could not have been more clear in its intention to extend Section 504's coverage to someone in Ms. Arline's position. 29 U.S.C. §707(7)(B)(ii) defines handicapped persons to include those with a record of impairment. It was added to the statute in 1974 specifically "to make clearer that the coverage of Sections 503 and 504 extends to persons who have recovered -- in whole or in part -- from a handicapping condition." Senate Com. on Labor and Public Welfare, Rehabilitation Act Amendments of 1974, Sen. Rep. No. 93-1297, 93rd Cong. 2d Sess., reprinted in 4 U.S. Code Cong. & Admin. News 6373, 6389 (1974). (Emphasis added.) Ms. Arline is just such a person.

Additionally, Ms. Arline meets the statutory definition of handicapped person

because she "is regarded as having . . . an impairment." 29 U.S.C. §706(7)(B)(iii). This case well illustrates that even when a disease is in remission, a person can be perceived as having a physiological disorder which impairs the major life activities of working and social interaction. When a person is believed, even if wrongly, to be substantially limited in her capacity for social interaction, and hence work, because of a handicapping disease (or an inherent characteristic of such a disease), then she is "handicapped" within the meaning of subsection (B)(iii). Thus, the fear of communicability, when it is associated with a condition which otherwise meets the statutory definition of handicap, far from being a rationale for failing to apply Section 504, is instead an indication that the Act must be invoked. As noted above, finding that the plaintiff's situation satisfies these

definitional requirements merely leads to consideration under the "otherwise qualified" test of what the medical ramifications of the asserted contagiousness really are. But the central point is nonetheless clear: irrational employer attitudes toward handicapped workers are precisely what Section 504 is intended to protect against.

The Justice Department's argument that a perception of contagiousness does not substantially limit a major life activity because contagion is not "disabling" is therefore not only irrational on its face, but represents a flagrant misreading of Section 504. By attempting to limit "disabling" to "adverse effects on an individual's ability to perform a physical or mental task," brief of the Department of Justice, the Justice Department attempts to resurrect the narrow definition of handicap in the 1973 version of the Act and ignores

the much broader scope of the current law, which rejects such a task-based focus. The Act originally defined "handicapped person" based on handicaps to employment and capacity to benefit from vocational services. Rehabilitation Act of 1973, Pub. L. 93-112, §7, 87 Stat. 359 (1973). Finding that definition "far too narrow and constricting," Congress in 1974 substituted an entirely new concept "focus[ing] on substantial limitations of an individual's functioning or of one or more of an individual's major life activities." Summary of Report of Senate Comm. on Labor and Public Welfare, 120 Cong. Rec. 30540 (Sept. 10, 1974).

Congress broadened the definition in 1974 to include "those persons whose mental or physical condition <u>does not substantially limit their life activities and who thus are not technically within [subsection (B)(i)]</u> . . . [but who] may be subjected to

discrimination on the basis of their being regarded as handicapped." Senate Rep. 93-1297 in 1974 U.S. Code & Admin. News at 6389-6390 (emphasis added). As this Court has recognized, a person described by this provision "may have no actual incapacity at all," Southeastern Community College v. Davis, 442 U.S. 397, 405, n.6 (1979), yet still be undeniably covered by the Act.

The inability to interact with others can be the impairment caused by a handicap, even when the handicap causes no impact on the intellectual ability or physical strength necessary for the job. This is often true of emotional or mental illnesses, which are covered by the Act. See, e.g., Doe v. New York University, 666 F.2d at 775. DHHS regulations interpret Subsection (B)(iii) to include such situations,10/ giving as one

10/ 45 C.F.R. 84.3(j)(2)(iv) provides:
"Is regarded as having an impairment" means (i) has a physical or mental impairment that
(cont'd next page)

example of a handicap, "cosmetic disfigurement." 45 C.F.R. 84.3(j)(2). The curtailment of social interaction, because of the attitudes of others, is precisely the impairment caused by cosmetic disfigurement.11/ If a lawyer suffers severe burns to the face but is perfectly capable of doing legal research, writing briefs and documents, and arguing in court, denial of employment based on fears of public reaction to the disfigurement would establish a prima

does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits its major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (b)(1) of this section but is treated by a recipient as having such an impairment...."

11/ The Justice Department weakly tries to explain away the inclusion of this example in the DHHS regulations by calling it "anomalous." The Department tries to cloud the scope of handicap-based discrimination covered by the Act by making irrelevant comparisons to non-handicap-related conditions, but the distinction is clear; cosmetic disfigurement is a handicap even though common homeliness is not.

facie case of discrimination based on handicap. When a limitation on major life activities flows directly from a physical or mental impairment as defined by the Act, Section 504 is applicable whether the limitation exists physiologically or is created by the attitudes of others.

5. A PERSON HANDICAPPED BY A COMMUNICABLE DISEASE MAY BE "OTHERWISE QUALIFIED" UNDER SECTION 504 IF THERE IS NO SIGNIFICANT RISK OF TRANSMISSION OF THE DISEASE.

The Court of Appeals correctly remanded this case to the trial court for "further findings as to whether the risks of infection precluded Ms. Arline from being otherwise qualified' for her job." Arline v. School Board of Nassau County, 772 F.2d at 765. This Court should affirm the order to remand so that the lower court can ascertain the exact nature of the risk posed by Ms. Arline's health condition.12/ Additionally, this Court should assist the

12/ See p. 43.

lower court by clarifying the standard by which to evaluate the evidence presented.

The correct standard to apply was used by the Second Circuit in a case involving the risk of hepatitis-B transmission by or among retarded children. In New York Assn. for Retarded Childen v. Carey, 612 F.2d 644, 650 (2d Cir. 1979), the Court struck down a board of education policy segregating those retarded children who carried the hepatitis-B virus on the ground that

> the Board was unable to demonstrate that the health hazard posed by the hepatitis-B carrier children was anything more than a remote possiblity. There has never been any definite proof that the disease can be communicated by non-parenteral routes such as saliva. Even assuming

12/ Alternatively, the Court could dismiss the writ of certiorari on the second question presented as improvidently granted, to allow development of the record. See, e.g., Taggart Weinaker's, Inc., 397 U.S. 223 (1970); Wainwright v. City of New Orleans, 392 U.S. 598 (1968) (Harlan, J. concurring). As discussed below, p. 52-55, the record is unclear as to the medical facts or the recommendation of the public health official who reviewed Respondent's medical history.

that there were, the activities that occur in classroom settings were not shown to pose any significant risk that the disease would be transmitted from one child to another.

The standard of significant risk of actual transmission, coupled with an examination of the seriousness of the disease, appropriately parallels the criteria for determining if the "otherwise qualified" requirement is met which have been developed by the Courts of Appeals in other cases in which risk of harm was an issue.[13/] In Doe v.

13/ Such a standard also parallels the Act's criteria for drug and alcohol abusers, who are protected against employment discrimination unless they are unable to perform the duties of the job because they "would constitute a direct threat to property or the safety of others." 29 U.S.C. §706(7)(B)(emphasis added). It is the standard used by the Department of Health and Human Services, even after the Justice Department issued its memorandum on AIDS, in finding noncompliance with Section 504 by a hospital which fired a health care worker. "[W]here the employee is a health care worker with a transmissible disease, the hospital's medical directors could, in consultation with the employee's personal physician, make a determination on an individual basis whether the infected employee can adequately and safely perform patient-care duties. The Office for Civil Rights recognizes that in cases involving health care workers who have such diseases the employer must be given the (cont'd next page)

New York University, 666 F.2d 761 (2d Cir. 1981), the Court analyzed the claim of a medical student with a history of mental illness in terms of whether there was "a significant risk of . . . recurrence," i.e., "a significant risk of harm to [herself] or others," especially "[i]n view of the seriousness of the harm inflicted in prior episodes." 666 F.2d at 777. In Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), involving a letter sorter machine operator who had epilepsy, the Ninth Circuit used the standard of whether "the applicant [is] presently qualified to perform the essential requirements of the job without a reasonable

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necessary latitude to fully and fairly evaluate any significant risks which may be posed by or to the employee." Letter of Marie Chretien, Regional Manager, Office of Civil Rights, August 5, 1986, Re: Complaint No. 04-84-3096 (emphasis added). (A copy of this letter has been lodged with the Court.) It is also comparable to the Occupational Safety and Health Administration Act standard, which requires workplaces to be "free of recognized hazards that are causing or likely to cause death or serious physical harm to employees." 29 U.S.C. 654(a)(1).

probability of substantial injury to the applicant or others." Id. at 1423. The court specifically rejected a "mere 'elevated risk' standard [as] not sufficient to ensure handicapped people's right to employment which complements their abilities. " Id. at 1422 (citations omitted). In Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983), the Third Circuit ruled that a school bus driver could not be dismissed for needing a hearing aid because the state failed to prove that use of such a device -- although not perfect in its avoidance of impairment to hearing -- did not present "an appreciable risk to the safety and control" of children riding school busses. Id. at 234.

These cases demonstrate that determining significant risk is well within the capacity of the courts.

> [T]he courts are . . . assigned a sensitive task, and that task is to ensure that the established legal standards -- constitutional and statutory -- are followed by government agencies. To permit the factual determinations of these agencies to go unchallenged may be to neglect this task, for the facts will often be dispositive, and the question of compliance with prevailing legal standards will often be determined by the manner in which the agency has found these facts.

New York Association for Retarded Children v. Carey, supra 612 F.2d at 648.

Moreover, legitimate public health interests benefit when stereotypes, misinformation, and inadequately-supported medical opinions are not permitted to form the basis for discriminatory acts.

The court's role and the standard utilized in reviewing employment actions under Section 504 should be the same whenever endangerment is an issue, regardless of whether the defendant alleges risk of contagicusness; risk of harm to others caused by blindness, deafness, mental illness, or other handicaps; or risk of future injury.[14/] All these claims require close analysis of

14/ See p. 48.

the facts as to the particular handicapped person; the particular job duties and environment; the specific nature, probability and consequence of the risk; and the likelihood of harm actually occurring. Without the courts to perform this crucial role, the intent of Congress to prevent discriminatory employment policies toward disabled persons capable of working will be flouted, and public respect for serious, medically justified public health concerns will be diminished.

Under the standards developed by the Courts of Appeals, employment or program participation will not be appropriate in some

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14/ The question is whether a plaintiff is qualified at the time of the employer's action, not whether he or she will be qualified at some future time. "Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily . . . . [A]llowing remote concerns to legitimize discrimination against the handicapped could vitiate the effectiveness of section 504 of the Act." Bentivegna v. United States Department of Labor, 694 F.2d 619, 622-3 (9th Cir. 1982).

instances. See, e.g., Doe v. New York University, supra; Doe v. Mental Health-Mental Retardation Commision, 704 F.2d 1402, rehearing en banc denied 709 F.2d 712 (5th Cir. 1983); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977). The application of these standards leads to the same result which this Court reached in Southeastern Community College v. Davis, 442 U.S. 397, 403 (1979). If the defendant can prove that a significant risk of harm is caused by the handicap, then the plaintiff is not otherwise qualified unless a reasonable accomodation by the defendant can remove the risk.

Amici herein agree with the position of the State of California and other states, Brief Point II, that "a plaintiff should not be precluded from rebutting the evidence offered by the defendant's decisionmaker and demonstrating that the decision was based on incorrect information or assumptions . . ."

Reliance on the advice of a physician cannot alone determine that a plaintiff was not otherwise qualified for a program. Many corporations employ "company doctors" who are not always in the position to be the most objective decision maker; the decision to exclude an applicant is generally the safer one from the standpoint of the physician's self interest.15/ Moreover, physicians like all humans, may err, witness the misstatement by Dr. McEwen herein that children of elementary school age are more susceptible to

15/ In describing the probative value of the testimony of a company doctor concerning the employability of a person with epilepsy, Kovarasky and Hauck state: "While the acceptance of this medical testimony is proper and entitled to careful evaluation, arbitrators are aware. or should be aware, that company doctors testifying are expected to display allegiance to the firm. Many company doctors are unnecessarily conservative when evaluating employees, choosing to err on the side of their employers." Kovarsky and Hauck, Arbitation and the Epileptic, Lab. L. J. 597, 602 (September, 1977). See generally, Dinman, The Loyalty of the Occupational Physician, 54 Bull. N.Y. Acad. Med. 769 (1978); Tabershaw, "Whose Agent is the Occupational Physician," 30 Archives Envt'l Health 412 (1975).

tuberculosis than older children or adults, a position not generally accepted by research, which finds no difference. See supra, p. 9.

Indeed, even lawyers make mistakes. The Department of Justice recently cited a prominent research scientist in support of the statement that "there are sure to be" cases in the future of transmission of the AIDS virus by casual contact. Justice Department Memorandum at 13. Shortly afterward, that scientist demanded and got a letter of apology from the Department, after re-iterating that "casual transmission such as is likely to occur in workplace settings will never pose a significant risk to uninfected co-workers." Pear, "U.S. Apologizes to AIDS Researcher," New York Times, July 23, 1986, p. D20. See also, U.S. Centers for Disease Control, "Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus

Type III/Lymphandenopathy-Associated Virus in the Workplace," 34 Morbidity and Mortality Weekly Report 681-695 (November 15, 1985).

6. BECAUSE THE RECORD IS UNCLEAR AS TO WHETHER THERE WAS SUFFICIENT JUSTIFICATION FOR TERMINATING RESPONDENT RATHER THAN SUSPENDING HER DURING HER CONTAGIOUSNES PERIOD, THE COURT OF APPEALS CORRECTLY REMANDED FOR A HEARING.

The Court of Appeals in this case was correct in remanding to the District Court to determine if the Respondent was "otherwise qualified" for her position as teacher. A suspension during the contagious period and the period necessary to verify that there is no longer any reasonable risk of contagion is justified as necessary to protect others. Removing an individual permanently from the work force is almost always unwaranted by scientific knowledge or public health concerns. A period of leave is common in

school systems, which offer sabbaticals,[16] sick leave, maternity leave, administrative leaves, and regularly utilize substitute teachers. State laws may mandate leaves for teachers or grant discretion to the school authorities with respect to leaves, and leaves may be available as of right under collective bargaining agreements. Fla. Stats. Ann. §231.39 (Supp. 1986).

In rare cases, there may be special factors that might justify differential treatment. See Allen v. Heckler, 780 F.2d 64,69-71 (D.C.Cir. 1985). Whether Respondent is such a case cannot be determined on this record. As the Court of Appeals noted herein (772 F.2d at 765), "the district court made no findings resolving the numerous factual disputes" as to whether Respondent was otherwise qualified. The Court of Appeals

16/ Florida law authorizes one year sabbaticals. Fla. Stats. Ann. §231.424 (Supp. 1986).

defined these issues as (1) the risks entailed in retaining Arline in her elementary school position; (2) risks in teaching less susceptible individuals and (3) the costs involved in accomodating Respondent in a new position.

The expert testimony in the case comes soley from Dr. McEuen, the Assistant Director of the Community Tuberculosis Control Service of the Florida Department of Health. She testified that she was "fairly confident" that Respondent will not have another relapse (J.A. 31), that she was negative in her 1981 culture (two years after the positive tests that led to her dismissal) and no positive test was reported since. Dr. McEuen also testified that at the time of trial the "possibility of her infectiousness is remote." (J.A. 42.)

At the same time, there are special factors applicable to Respondent which

require consideration, particularly the recurrence of the disease three times in a two year period. This may result either from Respondent having a strain of tuberculosis baccilli which was resistant to the drugs prescribed or from her failure to properly follow the prescribed regimens. The record is silent on this question. If the recurrence was the result of drug resistance, the medically indicated course is to vary the medication, and such a practice usually results in a cure and the end of the contagious period.

The record is also unclear as to whether Dr. McEuen ever recommended permanent removal of Respondent as an elementary school teacher. She testified that "when the last culture was reported positive, which I think was February of 1979, and it was my recommendation at that time that she not continue to teach third grade students."

(emphasis added.) (J.A. 13, but see J.A. 15). She was primarily concerned about the possibility of relapse, and was strongly influenced by the fact that elementary school students are with the same teacher in the same classroom all day, whereas older students and persons in adult education move from classroom to classroom and have a lower exposure to any one teacher. J.A. 16-19. Indeed, Dr. McEuen appeared to regard teaching older students as an acceptable risk even during the contagious period, J.A. 16, although the questions and answers were never precise as to time frame. Petitioner followed a practice of allowing teachers not certified at a particular grade level to teach nevertheless. J.A. 56-57. Thus, there is at least prima facie evidence that a reasonable accomodation could have been made consistent with the recommendation of the medical expert relied upon by Petitioner.

The determination of whether a person who has, or may carry, a contagious disease is otherwise qualified for a position or program depends on individual factors, rendering impossible a yes or no answer to the second question certified by the Court. Amici herein agree with the American Medical Association that the appropriate factors are (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious?), (c) the severity of the risk (what is the potential harm to third parties?) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. American Medical Association brief at 19.

No findings were made in this case on these or any other criteria. A remand in accordance with the opinion of the Court of Appeals is therefore appropriate. As the Court of Appeals stated, the trial court

should determine "whether the defendant's justifications reflect a well informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexsive reactions grounds in ignorance or capitulation to public prejudice." 772 F.2d at 765. Accord: Strathie v. Department of Transportation, 716 F.2d 227 (3d Cir. 1983); New York Ass'n. for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979).

7. PROTECTION UNDER SECTION 504 AGAINST PERMANENT EXCLUSION FROM EMPLOYMENT OR OTHER FEDERALLY FUNDED PROGRAMS OF PERSONS WHO HAVE HAD A CONTAGIOUS DISEASE WILL NOT INTERFERE WITH THE ENFORCEMENT OF PUBLIC HEALTH LAWS.

The protection afforded by Section 504 to victims of communicable diseases does not interfere in any way with the operation of public health laws which are designed to protect the public against the spread of

infectious disease. These laws are well nigh universal and are generally of two kinds -- reporting and isolation. Reporting statutes in no way deny anyone participation in the benefits of, or discriminate under, any program or activity. They only require that physicians, laboratories, and other specified persons or institutions report identified cases of communicable disease to public authorities.

Statutes relating to isolation may be general in nature, authorizing isolation during communicable periods, see, e.g., 42 U.S.C. §264(d), or they may relate to specific activities and provide for exclusion of persons with communicable disease. State laws applicable to education authorize exclusion of students in general terms ("attendance of the child to be inimicable to the welfare of other children," Alaska Stat. §14.30.045(41) or with specific reference to

communicable disease, e.g., Wisc. Stat. Ann. 143.12), or to tuberculosis specifically, e.g., Wisc. Stat. Ann. §143.06. Florida law permits isolation of a person with "an active case of tuberculosis." Fla. Stat. Ann. §§392.25, 392.26(2)(a) and (3)(a). These tuberculosis-specific statutes may specify that which is generally accepted in practice, that the exclusion from school of a person with tuberculosis applies only during the contagious stage. See, e.g., the Wisconsin statute requiring a physician's certificate that the teacher is "free from tuberculosis in a communicable form." Wis. Stat. Ann. §143.16.

Section 504, properly applied, does not invalidate or threaten the efficacy of these laws. The courts have uniformly followed the guidelines of the Equal Employment Opportunity Commission regulation that to be "otherwise qualified" a handicapped person

must be able to

> ...perform the essential functions of the position in question without endangering the health and safety of others.

29 C.F.R. §1613.702(f). See, e.g., Southeastern Community College v. Davis, 442 U.S. 397 (1979); Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Doe v. Region 13 Mental Health-Mental Retardation Commission, 704 F.2d 1402 rehearing en banc denied, 709 F.2d 712 (5th Cir. 1983); Strathie v. Dept. of Transportation, 716 F.2d 227 (3d Cir. 1983); Doe v. New York University, 666 F.2d 761 (2d Cir. 1981). Where there is a real risk that the health and safety of others is endangered, the courts have had no trouble in upholding the action of public health officials. See e.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905); S. Burris, Fear Itself: AIDS, Herpes and Public Health Decisions, 3 Yale Law and Policy Rev. 479 (1985). The careful balance between

protection of the public and the right of handicapped individuals to be free of irrational discrimination related to their handicap is maintained by the requirement of Section 504 that actions which deny handicapped persons employment or participation in federally funded programs out of fear for the safety of others be based on a proven likelihood of appreciable risk. See, e.g., Strathie v. Dep't of Transportation, 716 F.2d at 234 (appreciable risk to others); Mantolete v. Bolger, 767 F.2d at 1, 4, 22 (reasonable probability of substantial harm); Doe v. New York University, 666 F.2d at 775-777 (reasonable precautions or requirements; substantiality of the risk); Doe v. Region 13 Mental Health-Mental Retardation Commission, 704 F.2d at 1412 (reasonable justification). Under this standard, the tuberculosis patient who is actively infectious can be excluded from

employment or program participation for so long as a real risk of casual transmission exists, but no longer. Such a standard satisfies both public health concerns and the mandate of Section 504. Protecting the long-range employment rights of persons with tuberculosis will encourage prompt treatment, the most effective method of prevention.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the Court of Appeals and remand this case for further factual findings based on the standard of review discussed herein.

Respectfully submitted,

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